

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Criminal Docket
)	No. CR 18-14-GF-BMM
vs.)	
)	
STANLEY PATRICK WEBER,)	Court of Appeals
)	No. 19-30022
Defendant.)	

Partial Transcript of Trial with a Jury
413 Issue

Missouri River Federal Courthouse
125 Central Avenue West
Great Falls, MT 59404
Wednesday, September 5, 2018
10:09 a.m. to 11:07 a.m.

BEFORE THE HONORABLE BRIAN MORRIS
UNITED STATES DISTRICT COURT JUDGE

Yvette Heinze, RPR, CSR
United States Court Reporter
Missouri River Federal Courthouse
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Great Falls, MT 59404
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Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

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THE UNITED STATE OF AMERICA:

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PROCEEDINGS

(Open court.)

(Defendant present.)

(Jury present.)

(During Day 2 of the above-entitled trial, at 10:09 a.m., proceedings were as follows:)

THE COURT: Mr. Starnes, next witness.

MR. STARNES: Your Honor, may we have a sidebar?

THE COURT: You may.

(Discussion on the record at sidebar.)

(Defendant not present.)

THE COURT: We're at sidebar with counsel.

Mr. Weber waived his right to be here?

MR. STEINBERG: Yes, sir.

THE COURT: Okay. Mr. Starnes, your issue.

MR. STARNES: Thank you, Your Honor.

So the two victims in this case have now testified.

THE COURT: Yes.

MR. STARNES: We would like to address at some point the remaining 413 issues out there, and we're thinking about planning purposes for the Court.

THE COURT: All right.

MR. STARNES: So I have Michael Four Horns who we can call who is in custody.

THE COURT: Is he a --

1 MR. STARNES: He's not a 413. He's just a
2 corroboration witness, one of the Browning witnesses.

3 THE COURT: Okay.

4 MR. STARNES: We have another witness who is under
5 subpoena that we believe is en route to the courthouse, but
6 he's probably not going to be here for some time. That's
7 Justin Meineke.

8 THE COURT: What do you mean "some time"? This
9 afternoon?

10 MR. STARNES: Well, he left his house this morning.
11 He doesn't have a cell phone, so we believe he's en route.

12 THE COURT: He's from Browning?

13 MR. STARNES: He is.

14 THE COURT: Okay.

15 MR. STARNES: So that's why we'd like to see if we
16 can try to get a read from the Court on the remaining 413
17 issues that are out there.

18 THE COURT: All right. Which? These are the South
19 Dakota --

20 MR. STARNES: That's correct.

21 THE COURT: Which of them do you wish to call?

22 MR. STARNES: So there's three that we'd like to
23 call: Daniel Martin, Fred Gayton --

24 THE COURT: Hold up. D.J.M.?

25 MR. STARNES: D.J.M. is Daniel Martin. F.G. is Fred

1 Gayton.

2 THE COURT: Okay.

3 MR. STARNES: And then E.H.H. is Eugene Hunts Horse.

4 THE COURT: All right. And you want to call them for
5 what purpose?

6 MR. STARNES: Well, under *LeMay*, Your Honor -- so
7 there's a five-factor test we have to address. As the Court
8 recalls, we spent significant time addressing credibility
9 issues for Mr. Four Horns yesterday. The majority of his
10 testimony was that he was perpetrated by Dr. Weber at the
11 hospital facility. Mr. Martin will explain that each of the
12 incidents of sexual abuse that he experienced in South Dakota
13 also occurred in a hospital setting. It included acts of
14 digital penetration, sexual touching of his penis, and anal
15 penetration by Dr. Weber's penis.

16 THE COURT: Okay.

17 MR. STARNES: So I think his is the most closely
18 related to what Mr. Four Horns testified to, and credibility is
19 certainly an issue.

20 So under *LeMay*, I think the necessity of this
21 evidence with respect to Mr. Martin is heightened. I think the
22 similarity of the events is very much on par with what
23 Mr. Four Horns testified to. I don't think Mr. Martin has any
24 of the same potential mental health issues. He's currently
25 incarcerated on a charge --

1 THE COURT: What was the time frame for D.J.M.?
2 1995?

3 MR. STARNES: It would have been after 1995. I want
4 to say it's around '97, Your Honor. So he's a little bit
5 unsure because he remembers being about 8 or 9, but I think
6 that the timing of that would be that he would have to be
7 slightly older.

8 THE COURT: All right. Anything else?

9 MR. STARNES: With respect to the other two --

10 THE COURT: I'm sorry. Let's talk about him first.
11 Mr. Steinberg, what's your position on Mr. Martin?

12 MR. STEINBERG: Our position of Mr. Martin is that it
13 was a difference situation, different state, different time.

14 THE COURT: Different state?

15 MR. STEINBERG: Yeah.

16 THE COURT: Okay. So after he moves, that excludes
17 it?

18 MR. STEINBERG: No, but in terms of --

19 THE COURT: The time frame is 1995, according to the
20 government. '96.

21 MR. STEINBERG: Well --

22 THE COURT: You had --

23 MR. STEINBERG: -- I'm not convinced of that. I
24 think --

25 THE COURT: Hold on. You had Mr. Running Crane. You

1 were claiming he was 16.

2 MR. STEINBERG: I didn't claim anything.

3 THE COURT: Well, you were asking him about being 16.
4 That would make it 1997 for the Browning incident?

5 MR. STARNES: Well, that would be -- we will
6 establish that is not a possibility.

7 THE COURT: So it's pretty close in time and close in
8 type of activity.

9 MR. STEINBERG: Sure.

10 THE COURT: Close in age of the victims.

11 MR. STEINBERG: Well, here's the problem. Let's be
12 blunt. If we're going to let these things in, then we'll never
13 get a fair trial, and I understand the rules.

14 THE COURT: What do I do about *LeMay*. How do I apply
15 *LeMay*?

16 MR. STEINBERG: *LeMay* still says that you are the
17 gatekeeper. It still says you --

18 THE COURT: Okay. So we have -- here's the fact.
19 The similarity of the prior acts --

20 MR. STEINBERG: We're saying it's dissimilar
21 because --

22 THE COURT: Okay. It's similar.

23 MR. STEINBERG: -- anal sex --

24 THE COURT: It's similar. Come on. Anal sex versus
25 what? Versus asking for -- attempting anal sex?

1 MR. STEINBERG: No, there was no -- Four Horns
2 didn't --

3 THE COURT: Okay. The closeness in time of the prior
4 acts: It's roughly the same time frame, 1990s. Mid-1990s.

5 Do you agree?

6 MR. STEINBERG: No, because I don't think he will say
7 that. I think Martin doesn't know when it happened.

8 THE COURT: All right. The frequency of the prior
9 acts, that's in dispute. The presence or lack of intervening
10 circumstances: Mr. Weber moved from Browning to South Dakota.

11 MR. STEINBERG: And also, if I remember right, Martin
12 comes there, and he says that -- wait, I want to make sure.
13 May I have a moment?

14 THE COURT: You may.

15 (Off-the-record discussion between with Mr. Steinberg and
16 Mr. Cox.)

17 MR. STEINBERG: I don't know if we should be doing
18 this at sidebar. My concern is I don't have my notes. I want
19 to say -- and I could be wrong -- I think Martin is the one
20 whose mother comes with him to the exam room.

21 THE COURT: Hold on. Hold on.

22 You have a witness available right now?

23 MR. STARNES: We do, Your Honor. Michael Four Horns
24 is in custody. He will be very short.

25 THE COURT: Okay. Let's put on Michael Four Horns,

1 and then we'll take a break and --

2 MR. STARNES: And settle this out.

3 MR. STEINBERG: Thank you.

4 MR. STARNES: Thank you, Your Honor.

5 (Open court.)

6 (Defendant present.)

7 (Jury present.)

8 THE COURT: Mr. Starnes, next witness.

9 Oh, Ms. Suek, sorry. Next witness, please.

10 MS. SUEK: Thank you, Your Honor. The United States
11 calls Michael Four Horns.

12 (Testimony of Michael Four Horns.)

13 THE COURT: You may step down. Thank you, sir.

14 Mr. Starnes, you have another witness, or do we need
15 to address a legal issue?

16 (Off-the-record discussion between Mr. Starnes and
17 Ms. Suek.)

18 MR. STARNES: Your Honor, I think we'd like to
19 address the issue.

20 THE COURT: All right. We're going to take a break,
21 members of the jury. I'll call you back when we're ready to
22 go.

23 (Jury leave courtroom.)

24 THE COURT: Please be seated.

25 All right. Mr. Starnes, you want to call D.J.M.

1 MR. STARNES: That's correct, Your Honor. So at this
2 point -- so there's three witnesses from South Dakota that we
3 would like the Court to consider allowing us to testify in this
4 case. The primary one would be D.J.M., and I think that's
5 because, as discussed in the United States' second disclosure
6 of 413/414 evidence, I think his account is very -- the one
7 that is most similar to things that Mr. Four Horns described --
8 Ronald Four Horns -- Ronald Joe Four Horns described during his
9 testimony yesterday.

10 And as the Court recalls, there was a significant
11 credibility attack on Mr. Four Horns that occurred -- actually,
12 beginning back in opening statement, there was mention of the
13 fact that he may have a mental health issue, that he was on --
14 or not on medication at various times, that certainly he is an
15 incarcerated individual.

16 And so Mr. Four Horns also described being sexually
17 abused in a hospital-type setting, at the hospital in Browning.
18 He also described a hospital-type room in a Nurturing Center,
19 where he was similarly perpetrated by Dr. Weber when nobody
20 else was around.

21 So as the Court can see in our second notice, D.J.M.
22 will similarly testify that when he was a patient of
23 Dr. Weber's at the Pine Ridge Indian Reservation. We believe
24 no earlier 1996, but somewhere between 1995 and 1998,
25 approximately, when he first started seeing Dr. Weber. His

1 parents --

2 THE COURT: When did Dr. Weber move to Pine Ridge?

3 MR. STARNES: In 1995, and that's yet to be
4 established, Your Honor, but we will establish that. But he
5 moved in about the middle -- maybe July/August of 1995. And so
6 given the timing of when Mr. Martin was born and when Dr. Weber
7 moved, we have a rough idea of how young he could have -- like
8 the earliest this could have happened to him in his life.

9 THE COURT: Okay.

10 MR. STARNES: But he describes four instances where
11 he was perpetrated by Dr. Weber that involved acts of digital
12 penetration, anal penetration, anal rape, touching, sexual
13 touching that took place in the hospital environment.

14 Mr. Martin will testify that on at least one
15 occasion, possibly more, he was brought to the hospital by his
16 parents but none of the -- or an adult, but no adults were
17 present in the room with him during these sessions.

18 So I think that his description of what happened to
19 him is the one that is most similar to what Mr. Four Horns
20 described. So that takes you back to the *LeMay* factors, the
21 similarity of the events in question. That's going to be a
22 factor that weighs heavily in favor of allowing us to present
23 D.J.M.'s testimony.

24 THE COURT: What about the other factors?

25 MR. STARNES: Well, so closeness in time and lack of

1 intervening events are going to be two that can be taken at the
2 same time. Really all that happened was Dr. Weber moved from
3 the Browning IHS in 1995 to the Pine Ridge IHS later on in 1995
4 and would have picked up seeing patients, had access to these
5 individuals, including D.J.M.

6 So the closest in time would have been probably no
7 more than about two to three years between the times that --
8 the testimony that we've heard from Mr. Running Crane and
9 Mr. Four Horns. I guess Mr. Running Crane was a little bit
10 convoluted in his time line. But we know that Mr. Weber was
11 assigned to the hospital from 1992 to 1995 in Browning. So he
12 would have left. So those events would have occurred between
13 '92 and '95, sometime in there, and then you pick up in 1996,
14 1997, possibly 1995. Closeness in time, very close in time.

15 THE COURT: All right. Next factor is the frequency
16 of the prior acts.

17 MR. STARNES: Correct. So we heard about a number of
18 acts from Mr. Four Horns that occurred to him. He could not
19 put a precise number on it. We know that it was more than one.
20 He said it was several. He didn't know the exact number. With
21 respect to Mr. Running Crane, we talked about two instances of
22 sexual conduct.

23 THE COURT: And then we have presence or lack of
24 intervening circumstances.

25 MR. STARNES: Correct. The only intervening

1 circumstance was that Mr. Weber moved from one hospital to the
2 other by way of transfer.

3 THE COURT: The necessity of the evidence.

4 MR. STARNES: And I think that's the key factor here.
5 When we're dealing with these two individuals, particularly
6 Mr. Four Horns who has significant credibility issues -- and
7 his credibility was attacked many times on cross-examination
8 and from the outset during the defense's opening statement --
9 you have somebody who's been incarcerated, somebody with
10 significant issues, he's been on and off medication that helps
11 regulate his behavior over time, I think that the fact that
12 this happened to other individuals who are going to describe
13 similar acts that occurred to them will bolster the credibility
14 of Mr. Four Horns. And that's the exact reason why we have 413
15 and 414 evidence, Your Honor. And I've laid that all out in my
16 motion but --

17 THE COURT: So we finish up D.J.M. and then
18 Mr. Steinberg cross-examines him.

19 MR. STARNES: Correct.

20 THE COURT: And then if you believe he was effective
21 in undermining D.J.M.'s credibility, then you want to call F.G.

22 MR. STARNES: And I think we should be entitled to
23 call them both at this point because F.G., he talks about four
24 instances. Three of those instances occurred at the hospital.
25 One of the instances occurred in Dr. Weber's home at the Pine

1 Ridge Indian Reservation.

2 So just so the Court is aware, the testimony would be
3 roughly that after -- well, once the South Dakota victims
4 encountered Dr. Weber, it was similar. He was living in
5 government quarters. He was an IHS employee. He was a
6 pediatrician at the Pine Ridge Indian Reservation. He met many
7 of these boys because they were patients. That's how he first
8 gained access to them.

9 So with respect to D.J.M., all of the abuse occurred
10 at the hospital. With respect to F.G., three of the four
11 instances that F.G. would testify about occurred at the
12 hospital. One instance occurred at Dr. Weber's home, which was
13 on the IHS compound in the Pine Ridge Indian Reservation -- or
14 the government housing on the IHS Pine Ridge Indian
15 Reservation.

16 THE COURT: How does F.G. differ from E.H.H.?

17 MR. STARNES: So E.H.H. is slightly different because
18 all of the abuse that occurred to E.H.H. occurred at
19 Dr. Weber's home. So E.H.H. would be more similar to
20 Mr. Running Crane's testimony.

21 THE COURT: Is there any -- how do the time frames
22 for F.G. and E.H.H. compare to D.J.M.?

23 MR. STARNES: Similar time frame, Your Honor. It
24 would have -- well, okay. So there was -- I think E.H.H. had
25 some more ongoing abuse. He had several encounters with

1 Dr. Weber over a period of time. Whereas at least with respect
2 to the encounters at the hospital for F.G., it would have
3 occurred in similar proximity around the same time that --

4 THE COURT: What are the ages of F.G. and E.H.H. at
5 the time this happened?

6 MR. STARNES: Today or --

7 THE COURT: No, at the time it happened.

8 MR. STARNES: So we believe, Your Honor, they would
9 testify that the acts would have occurred as earlier as 9 or 10
10 for D.J.M., and up until -- may I have just a moment, Your
11 Honor?

12 THE COURT: Yes.

13 (Off-the-record discussion between Special Agent Muller,
14 Ms. Suek, and Mr. Starnes)

15 MR. STARNES: So we believe F.G. was around 11 when
16 the abuse started, and E.H.H. was perhaps as old as 15.

17 THE COURT: All right. Anything else?

18 MR. STARNES: No, Your Honor. I think that what's
19 laid out -- well, based on the testimony of the two victims,
20 the potential credibility issues they have, this evidence
21 should be allowed in.

22 THE COURT: All right. Thank you.

23 MR. STARNES: Thank you.

24 THE COURT: Mr. Steinberg.

25 MR. STEINBERG: Thank you, sir.

1 In reverse order in term of the factors.

2 THE COURT: Pardon?

3 MR. STEINBERG: If we could do them in reverse order.

4 THE COURT: Go ahead.

5 MR. STEINBERG: The one I don't quite understand is
6 necessity. And I don't know how to interpret that from a
7 litigant's standpoint, let alone a Court's standpoint. Does
8 that mean the Court says, "Hey, I think that the prosecution
9 needs this evidence because there's a danger the defendant
10 might be acquitted?" I just don't understand it.

11 And in terms of this suggestion that there was an
12 attack on credibility, there was no attack on credibility as
13 much as there was putting out the facts. No one is suggesting
14 that Four Horns wasn't incarcerated. No one is suggesting --

15 THE COURT: Come on, Mr. Steinberg. Let's get
16 serious. You attacked Mr. Four Horns's credibility. You
17 attacked Mr. Running Crane's credibility. There's no doubt
18 about that. Just with the facts, you attacked their
19 credibility. Let's not waste time.

20 MR. STEINBERG: Okay. Well, it's not, if you will --

21 THE COURT: Tell me a Ninth Circuit case from a
22 District Court or the Court of Appeals that has disallowed this
23 kind of testimony under 413/414 in applying the *LeMay* factors.

24 MR. STEINBERG: Well, the cases all say and the rule
25 says that that --

1 THE COURT: That's not my question. My question is
2 tell me a case where --

3 MR. STEINBERG: They never appealed.

4 THE COURT: Pardon me?

5 MR. STEINBERG: They never go up that way. They only
6 come up the opposite way.

7 THE COURT: Tell me a case -- I said a District Court
8 or Court of Appeals that has disallowed this type of evidence.

9 MR. STEINBERG: Well, I am not aware of any. But the
10 point is, is that it's a fairly new rule. And in terms of the
11 rule itself --

12 THE COURT: Fairly new when? Not like last year.
13 This has been around a while.

14 MR. STEINBERG: Yeah, but it's not like 20 years old.
15 So my point being that these cases are only going to go up on
16 the other side when there's a suggestion that it shouldn't have
17 come in.

18 THE COURT: Well, *LeMay* is from 2001.

19 MR. STEINBERG: No, I understand.

20 THE COURT: So that's 18 years ago. So, in fact, the
21 rule is almost 20 years old.

22 MR. STEINBERG: Yes, sir.

23 THE COURT: So what you said there wasn't accurate.

24 MR. STEINBERG: Well, it's not more than 20 years
25 old.

1 THE COURT: Okay. Well, it's at least 18.

2 MR. STEINBERG: Yes, sir.

3 THE COURT: And that's pretty close to 20.

4 MR. STEINBERG: Yes, it is.

5 THE COURT: Okay. So --

6 MR. STEINBERG: I mean, if you want --

7 THE COURT: -- I'm trying to balance Mr. Weber's
8 right to be tried on the charges in Montana --

9 MR. STEINBERG: Right.

10 THE COURT: -- with the government's right to present
11 corroborating evidence.

12 MR. STEINBERG: And so you are already allowing --
13 there's one witness that's going to come in from Montana that's
14 a, quote, "similar," unquote. So you already have three
15 separate victims.

16 THE COURT: Which one is that?

17 MR. STEINBERG: I forget his initials. The last
18 initial is M.

19 THE COURT: M. All right.

20 MR. STEINBERG: I think it's J.M.

21 THE COURT: Okay.

22 MR. STEINBERG: D.M.

23 THE COURT: J.M. Or D.M.

24 MR. STARNES: It's J.M.

25 MR. STEINBERG: I thought it was J.M.

1 THE COURT: J.M.

2 MR. STEINBERG: Okay. So now that's three.

3 THE COURT: Three what?

4 MR. STEINBERG: Three separate events of allegations
5 concerning sexual misconduct. And if the idea is, hey, we want
6 to give -- in terms of this balancing act, we want to give a
7 fair trial to my client, you have three people, three separate
8 occasions, three people who apparently don't have a close
9 relationship, know each other, are coming up with allegations.
10 Isn't that enough? You're saying, "No, under necessity, we're
11 going to allow six." Then you say, "Now we have three more."

12 And does anyone think -- anyone think, that can
13 logically look and be fair say, "Hey, we have six people come
14 in, and the jury is going to be told, 'Hey, you're on trial
15 only for the two'?" And I'll go to trial in South Dakota on
16 the ones that are there. We're going to be on trial there.

17 THE COURT: You'll argue that the Montana stuff
18 shouldn't come in.

19 MR. STEINBERG: Well, that's part of it. But
20 isn't -- Montana, here, you have the three separate events.
21 And in terms of necessity you have the three separate -- four
22 separate events in South Dakota?

23 THE COURT: 413 and 414 are different than 404(b). I
24 understand --

25 MR. STEINBERG: No question.

1 THE COURT: -- there's a balancing. But this was a
2 specific attempt by the Congress to broaden the scope of
3 admissibility in child sex cases.

4 MR. STEINBERG: I agree. And then there's still 403,
5 and there's still this thing called a due process clause which
6 is fairness in terms of a trial in saying, "Look, I can look
7 down and say Weber got a fair trial."

8 If there's anyone here who suggests that if you have
9 six different incidents come in and the jury is not going to
10 say, "Hey, clearly, if those happened, these happened." That's
11 the danger here. And that's not a fair trial because I don't
12 get tried on the two events that are part of the indictment,
13 but rather I get -- and I shouldn't say "events" -- the two
14 individuals that are part of the indictment, but rather I get
15 tried on his character. And they are going to say his
16 character -- and that's what it comes down to. Let's be
17 honest. They just want to -- and I don't blame them. I
18 suppose if I was on their side, I would say, "Hey, let's put
19 his character in front of this jury and let them know who he is
20 and what he does and they'll convict." And they're probably
21 right. Then I'll never get a fair trial, and no one who ever
22 sits in that chair will get a fair trial. If that's what it's
23 come to, so be it.

24 But I'm kind of passionate about this because I
25 absolutely have done enough of these cases to know that no jury

1 in the world faced with this kind of situation is ever going to
2 be able to separate it out and try him based on the indictment
3 that's before this district. It will be, "Hey, he's a bad guy.
4 He did this. There's no question he did this. If we had any
5 question about Four Horns or Running Crane, we know he's a bad
6 guy." That's what this comes down to, bottom line.

7 THE COURT: Well, don't we have -- doesn't your
8 argument protect someone who moves around?

9 MR. STEINBERG: No. Because, as I said, you already
10 have three events. If this was a single event, then the
11 Court's argument might have some validity -- and I'm sorry --
12 the Court's suggestion might have validity, but that's not this
13 case. Because this case, there are already three separate
14 events coming in, three separate victims coming in, three
15 separate time frames coming in. So I would have to say, "no."

16 THE COURT: All right. And, again, I asked you for a
17 case where a District Court or the Court of Appeals has
18 excluded this type of evidence.

19 MR. STEINBERG: And I'm not aware of any in the Ninth
20 Circuit.

21 THE COURT: Aware of any in any circuit?

22 MR. STEINBERG: No, sir.

23 THE COURT: All right. Rule 414 was adopted
24 September 3rd, 1994, Mr. Steinberg. Effective July 9th, 1995.
25 So it's 23 years old.

1 MR. STEINBERG: Yes, sir.

2 THE COURT: And in those 23 years, I'm asking you for
3 any court that has excluded this evidence. You told me it
4 wasn't 20 years old.

5 (Off-the-record discussion between Mr. Steinberg and
6 Mr. Cox.)

7 THE COURT: Mr. Steinberg, do you have anything else?

8 MR. STEINBERG: May I have a moment, Judge?

9 (Off-the-record discussion between Mr. Steinberg and
10 Mr. Cox.)

11 MR. STEINBERG: Judge, I suppose instructive --
12 what's the case? -- is *United States v Rogers*. That can be
13 found at 587 F.3d 816. And it's a Seventh Circuit case, and it
14 does cite *LeMay* and talks about the factors and how Courts
15 still are the gatekeeper and have to be careful when it comes
16 to this kind of --

17 THE COURT: What was the holding?

18 MR. STEINBERG: Was not -- well, the holding was you
19 have to be careful, but then they reversed the exclusion.

20 THE COURT: And the holding was that the evidence
21 should have been admitted?

22 MR. STEINBERG: Yes.

23 THE COURT: Okay. Here's what we're going to do.
24 Mr. Starnes, I am going to allow you to put on two South Dakota
25 victims.

1 MR. STARNES: Okay.

2 THE COURT: I'll let you decide. I want one of
3 them -- D.J.M., That's the hospital setting?

4 MR. STARNES: That's correct, Your Honor.

5 THE COURT: All right. And you can choose between
6 E.H.H. and F.G. regarding -- that was the home situation?

7 MR. STARNES: That's correct, Your Honor.

8 THE COURT: All right. I looked at the similarity of
9 the acts. All involve various types of alleged sexual abuse
10 with boys between the ages of 8 and 15. These events took
11 place between -- the Montana events, between 1993 and '95,
12 roughly. And the South Dakota events are '96, '97, something
13 like that. Is that correct?

14 MR. STARNES: That's correct, Your Honor. We believe
15 that's when they first began.

16 THE COURT: All right. The frequency of the prior
17 acts, I'm not sure that's relevant here.

18 The only intervening circumstance was Mr. Weber's
19 move from Montana to South Dakota.

20 The necessity, again, Mr. Steinberg raises a valid
21 point. It is a necessity because the government can't prove
22 their case and there's a chance that the defendant would be
23 acquitted? I think the case law has interpreted necessity as
24 whether the government needs these witnesses to either
25 establish the credibility of the alleged victims or to

1 rehabilitate efforts that have been made to undermine the
2 credibility.

3 I think we've had attacks on the credibility of
4 Mr. Four Horns and Mr. Running Crane. So I'll allow two of
5 those witnesses to testify at this point.

6 MR. STARNES: Thank you, Your Honor.

7 THE COURT: Any questions, Mr. Steinberg?

8 MR. STEINBERG: No, sir.

9 THE COURT: Okay.

10 MR. STARNES: Would the Court like us to go ahead and
11 notify you which of the two witnesses, or may we have a few
12 minutes to consider it?

13 THE COURT: Why don't you have a few minutes to
14 consider it. We'll be back here -- are they available?

15 MR. STARNES: We have -- I need to double-check.
16 They are both in the courthouse, Your Honor.

17 THE COURT: All right. Let me know as soon as you're
18 ready. I'd like to get this case moving. We've had two
19 witnesses in a day and a half.

20 All right. Let the clerks know as soon as you're
21 ready to continue.

22 MR. STARNES: Thank you.

23 THE COURT: We'll be in recess.

24 (Proceedings in recess from 10:52 a.m. until 11:01 a.m.)

25 (Open court.)

1 (Defendant present.)

2 THE COURT: Please be seated.

3 During the break, I reviewed again the *Rogers* case
4 cited by Mr. Steinberg, and I want to point out a couple of
5 items there. In the *Rogers* case, the District Court had
6 excluded evidence of a defendant's prior conviction involving
7 any sexual act as well as prior conduct involving internet
8 chats. He was charged with -- in the case at hand, he was
9 charged with chatting with -- well, let's see -- sexual
10 assault. And, as the Court noted, he had a propensity for
11 chatting with young girls on the internet. And so the District
12 Court excluded the evidence of the prior conviction and prior
13 conduct. And the Court reversed noting that the evidence was
14 relevant for a number of reasons. First is that the
15 evidence -- prior conduct made it more likely that the
16 defendant, by chatting with the girls, attempted to entice the
17 minor to engage in sexual activity and to send obscene material
18 to her. I guess, looking at that same analysis, the conduct in
19 South Dakota is relevant to the extent it indicates that
20 Mr. Weber engaged in that type of activity.

21 Second, the motion by *Rogers* is that the evidence
22 established motive by showing that the defendant had a taste
23 for engaging in a crime or a compulsion to engage in it. I
24 think the South Dakota evidence clearly establishes a motive
25 here.

1 Third, the simple fact that the defendant had done it
2 before makes it more likely to do it again. That's what they
3 call propensity evidence. The Court said that Rule 413/414,
4 the propensity analysis is different than 403 and 404. And it
5 goes on to say that when we're looking at 413 evidence and you
6 apply the 404(b) or the 403 balancing, it's a different
7 standard than simply 404 evidence. The burden shifts here.

8 And it goes on to say, unlike *LeMay*, the Ninth
9 Circuit isn't going to give you a list. We just want you to
10 consider a number of factors? I don't think *Rogers* helps
11 Mr. Weber's argument. I'm in the Ninth Circuit anyway. I'm
12 bound by *LeMay*. I can apply the *LeMay* factors. I will allow
13 the government to present two of these witnesses: One
14 involving alleged sexual conduct at Dr. Weber's office or
15 hospital, and one involving alleged sexual conduct at his home.
16 I think that mirrors the allegations by the government in this
17 case regarding -- Mr. Four Horns alleged that activity took
18 place in an office setting, and Mr. Running Crane alleges the
19 activity took place in Dr. Weber's home. So I will allow one
20 corroborating witness for each of those locations.

21 Have you decided on which ones, Mr. Starnes?

22 MR. STARNES: Yes, Your Honor. I believe we would
23 call Fred Gayton. F.G. would be the individual whose testimony
24 we would present, in addition to D.J.M.

25 THE COURT: D.J.M. and F.G. All right. Are they

1 here?

2 MR. STARNES: D.J.M. is here. He's in custody, Your
3 Honor. We would begin with him as soon as the jury is back.

4 THE COURT: All right. Are we ready to proceed,
5 Mr. Steinberg?

6 MR. STEINBERG: May I ask the Court one question?

7 THE COURT: You may.

8 MR. STEINBERG: It's interesting here because I did
9 check the effective dates, and they were both effective
10 September 13th of 1994. And I'm talking 413/414.
11 Interestingly enough, the indictment alleges conduct before the
12 effective dates.

13 THE COURT: These are procedural rules.

14 MR. STEINBERG: I understand.

15 THE COURT: Okay.

16 MR. STEINBERG: It's still interesting.

17 THE COURT: It is interesting.

18 MR. STEINBERG: So the question now becomes, given
19 the Court's analysis, would the Court reconsider and not allow
20 the testimony of J.M.? And the reason for that is J.M.'s
21 allegations are completely dissimilar to anything.

22 THE COURT: No. I'll reconsider after I hear his
23 testimony.

24 MR. STEINBERG: I'm sorry?

25 THE COURT: I said I'll reconsider after I hear this

1 testimony.

2 MR. STEINBERG: Yes, sir.

3 THE COURT: I'll give you a chance to argue about
4 that.

5 MR. STEINBERG: Thank you, sir.

6 THE COURT: As I explained at the pretrial
7 conference, those rules are preliminary based upon the evidence
8 that gets admitted. During the next break, we can take that
9 issue up.

10 MR. STEINBERG: Yes, sir.

11 THE COURT: So for scheduling, I have a sentencing
12 hearing at 12:30 today. So we're going to go now, I hope, till
13 about 12:15. Give me a chance to get a quick bite before the
14 sentencing hearing. We'll pick up at 1:30 after that.

15 MR. STEINBERG: Yes, sir.

16 THE COURT: All right. Madam Clerk, please bring in
17 the jury.

18 (Jury present.)

19 THE COURT: Please be seated. Welcome back members
20 of the jury. I apologize for the delay.

21 Mr. Starnes, please call your next witness.

22 (Trial proceeding continued.)

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REPORTER'S CERTIFICATE

I, Yvette Heinze, a Registered Professional Reporter and Certified Shorthand Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Great Falls, Montana, this 18th day of March, 2019.

/s/ Yvette Heinze

Yvette Heinze
United States Court Reporter